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In the Supreme Court of the United States

October Term, 1975
No. 75-1516

FIRE OFFICERS UNION, ET AL.,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

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9 J. Moore & B. Ward, Federal Practice, ¶203.06, at 715 (2d ed. 1975) 8

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QUESTIONS PRESENTED

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1. Whether the District Court properly denied the petition to intervene?

2. Whether the Court of Appeals properly denied Petitioners' appeal of the merits because they were not parties below?

STATUTE INVOLVED

Federal Rules of Civil Procedure, Rule 24 (a) (2), Title 28 U.S.C.:

> "Rule 24. Intervention
>
> (a) Intervention of Right. Upon Timely Application anyone shall be permitted to intervene in an action: (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

STATEMENT OF THE CASE

The statement of the case presented by Petitioners is based on allegations which are either unsupported or contradicted by the record. The same allegations of fact were made in the Court of Appeals. That court, after careful review of the record, found those allegations to be incorrect (Opinion of the Court of Appeals, Appendix A of the Petition, A. 10-11). Consequently, for the sake of brevity, we adopt the factual statement of the Court of Appeals as outlined in its opinion on pages A-3 through A-7 of Appendix A of the petition.

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ARGUMENT

This petition for certiorari involves merely two issues: (a) whether the District Court properly denied the petition to intervene; and (b) whether the Court of Appeals properly dismissed Petitioners' appeal of the merits because they were not parties below. These issues do not warrant review by this Court on certiorari whether viewed individually or in the aggregate. The decisions below were clearly correct and consistent with the recent decisions of this Court; there is no conflict of decision among the circuits; and there are no important questions of Federal law raised by the petition.

I.

Both the District Court and the Court of Appeals, after independently examining the record, found that the applications for intervention were untimely. Only three years ago, this Court in *NAACP v. New York*, 413 U.S. 345, 365-66 (1973), established the standards to be applied in determining whether or not a motion for intervention is timely:

> "Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a), and Rule 24(b), that the application must be 'timely.' If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has pro-

gressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." (Footnotes omitted.)

The District Court and the Court of Appeals scrupulously followed the standards for timeliness as laid down by this Court. Both courts examined "all the circumstances" including (1) how far the proceedings had gone when the movant sought to intervene, (2) prejudice which resultant delay might cause the other parties, and (c) the reason for the delay. After such review of all the circumstances, *each* court concluded that the intervenors had been adequately represented in the District Court and that the petitions to intervene were untimely.

It is clear that the correct legal principle concerning intervention was followed and that the decisions made by the courts below were in conformity with decisions of other Courts of Appeals and with this Court.[1] Petitioners neither discuss nor even cite *NAACP v. New York, supra,* the leading case on timeliness and the case primarily re-

[1] The citation by the Petitioners to *Trbovich v. United Mine Workers,* 404 U.S. 528 (1972), and *Hodgson v. United Mine Workers,* 473 F.2d 118 (D.C.Cir. 1972), are both inapposite. In each case, the intervention question turned on the adequacy of representation by the Secretary of Labor in an action brought under the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §461 *et seq.* Findings of inadequacy of representation were based on the role of the Secretary of Labor vis-a-vis union members under the specific terms of the LMRDA. *See Trbovich,* 538-39.

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lied upon by the Court of Appeals. Rather, they merely assert that their version of the facts of adequacy of representation and timeliness is correct, entitling them to intervention as of right.

This is not a sufficient ground upon which to urge review by this Court on certiorari. The Petitioners' version of the facts has been reviewed and rejected by both the District Court and the Court of Appeals. In both courts intervention was denied. Indeed, both courts found that Petitioners' allegations of fact were nowhere supported in the record [2] (Opinion of the Court of Appeals, Appendix A of Petition, A. 10-11; Opinion of the District Court, Appendix C of Petition, C. 60-62). This is not an appropriate case for review by this Court: "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing." *Magnum Company v. Coty*, 262 U.S. 159, 163 (1923) (Chief Justice Taft). Certiorari should be denied where, as in the instant case, review is being sought which turns upon an analysis of the particular facts involved, especially where the findings of fact made by the District Court received the unanimous concurrence of the Court

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[2] The allegations of fact in the instant petition are identical to those rejected by both the District Court and the Court of Appeals with one exception. That exception is the claim by the Petitioners that they were not allowed to present evidence on the issue of intervention. This is blatantly false and misleading to this Court. The fact of the matter is that the proposed intervenors had every opportunity to but did not submit any evidence in support of their petitions, nor did they even file a pleading. In contradistinction, plaintiffs below submitted evidence in opposition to the petitions to intervene.

of Appeals. This Court has often held that "a court of law, such as this court is, rather than a court for the correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

Moreover, another reason militating against this Court's acceptance of this case on certiorari is that the decisions of the District Court and the Court of Appeals on intervention were clearly correct. The first petitions to intervene were filed almost a year after the complaint was filed; five months after relief had been issued with respect to hiring; four months after the issuance of the pretrial order setting a date for the final hearing; after extensive discovery had been conducted and concluded; and after a preliminary injunction had been issued with respect to promotions. Their first attempts to intervene occurred at a critical stage in the litigation. The parties had filed their final pretrial memoranda and exhibits, and the District Court was carefully considering the evidence and the arguments of the parties, and the court was preparing its findings of fact, conclusions of law, and final order. The proposed intervenors admit that they had a long-standing knowledge of this litigation and the only excuse they ever offered for delaying so long in seeking intervention is that they relied on defense counsel's representations that their interests were adequately asserted.

The factual situation in this case was so similar to *NAACP v. New York*, 413 U.S. 345 (1973), that it mandated the Court of Appeals' affirmance of the District Court's ruling herein. The Petitioners' position in this case

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is even weaker than the NAACP's. They knew of the litigation and the requested relief from the inception; the case was well publicized; they waited much longer before attempting to intervene; preliminary relief had been granted five months previously; extensive discovery had been held and completed; and the case had reached a critical stage with the District Court preparing its final decision. The Petitioners offer the same meager excuse for their delay—that they were lulled into inaction by representations of defense counsel—although here, unlike in *NAACP v. New York,* there was no evidence presented to support this allegation. Moreover, the Petitioners have never stated that they have new substantive evidence to offer. Thus, the Court of Appeals' decision affirming the District Court's denial of the petition to intervene is clearly consistent with the decisions of this Court.

II.

The second question presented to this Court for review, is even less substantial than the first—whether the Court of Appeals properly dismissed the Petitioners' appeal on the merits on the ground that only a party of record may appeal. The applicable general rule, that only a party of record to the District Court may appeal from its judgment, has long been well established:

> "[I]t has long been the law as settled by this court that 'no person can bring a writ of error [an appeal is not different] to reverse a judgment who is not a party or privy to the record,' Bayard v. Lombard, 9 How. 530, 551 and in Ex parte Tobacco Board of Trade, 222 U.S. 578, it was announced, in

> a per curiam opinion, as a subject no longer open to discussion, that 'one who is not a party to a record and judgment is not entitled to appeal therefrom,' . . ." *United States ex rel. Louisiana v. Jack,* 244 U.S. 397, 402 (1917).

See, Credits Commutation Co. v. United States, 177 U.S. 311 (1900); *Payne v. Niles,* 61 U.S. (20 How.) 291 (1857); 9 J. Moore & B. Ward, Federal Practice, ¶203.06, at 715 (2d ed. 1975).

None of the cases cited in the petition are on point. *Hodgson,* supra, did not involve intervention in the Court of Appeals at all. Both *American B. Shoe and Foundry Company v. Interborough R. T. Company,* 3 F.R.D. 162 (S.D.N.Y. 1942), and *Hurd v. Illinois Bell Tel. Company,* 234 F.2d 942 (7th Cir. 1956), involved cases where one of the parties (representing a class) *took* an appeal but then jeopardized the effective prosecution of that appeal. In those instances, the Court of Appeals allowed other class members to intervene in the ongoing appeal to insure that the class would not be injured by the class representative's lack of faithfulness in prosecuting the appeal. *Auto Workers v. Scofield,* 382 U.S. 205 (1965), held that parties who are wholly successful in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene in the Court of Appeals review proceedings.

III.

Insofar as Petitioners ask this Court to review the final order of the District Court with respect to promotions, that issue is clearly not before this Court; the Court

of Appeals never passed on that contention, having dismissed the Petitioners' appeal of the District Court's orders on the merits on the ground that only a party of record in the District Court may so appeal. If this Court decides that the Petitioners are entitled to intervene, they will have an opportunity to contest the merits in either the District Court or the Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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